CHIN SIN MOTOR WORKS SDN BHD & ANOR v AROSA DEVELOPMENT SDN BHD & ANOR

HIGH COURT (KUALA LUMPUR) —
LIM BENG CHOON J

Tort — Negligence — Sale of land — Sale and purchase agreement — Stage completion certificates issued by vendor's architect pursuant to agreement — Whether negligently given — Whether architect owes a duty of care to the purchaser

In this action the first plaintiff purchased a piece of land from the first defendant who also agreed to construct a building thereon for the purchase price of $460,000. The first plaintiff entered into a loan agreement with the second plaintiff who was to make progress payments towards the purchase price. After filing their writ and statement of claim, the plaintiffs applied under O 14 r 1 of the Rules of the High Court 1980 for leave to enter interlocutory judgment against both the first defendant and the second defendant, who was the architect of the first defendant, in respect of the construction of the building. This application was dismissed by the senior assistant registrar ('SAR') on 30 March 1991. The plaintiffs appealed to the High Court. At the appeal hearing on 25 July 1991 the plaintiffs confined submissions against the decision of the SAR in respect of the second defendant and abandoned the appeal against the decision of the SAR against the first defendant.

By a written sale and purchase agreement dated 1 April 1985 made between the first plaintiff and the first defendant ('the agreement'), the first defendant agreed to sell and the first plaintiff agreed to purchase a piece of land with a building to be erected upon by the first defendant. By cl 4(1) of the agreement the purchase price was to be paid to the first defendant by instalments progressively according to the stages of completion of the building set out in the Third Schedule of the agreement. By item (3) of the Third Schedule, an instalment inthe sum of $69,000 would become due and payable to the first defendant upon handing over vacant possession of the land and building with connection of water and electricity supply. By item (4) of the Third Schedule, a final instalment of $23,000 would be due and payable to the first defendant but was to be held by the first defendant's stakeholders and payments thereof to be made in two instalments, that is to say a sum of $11,500 upon the expiry of six months and the balance of $11,500 at the expiry of 12 months after the handing over of vacant possession. It was the second defendant's duty, as the architect, under the sale and purchase agreement to certify each stage of completion of the building which certification would be relied on by the first plaintiff and/or its financier, the second plaintiff, for the purposes of making instalment payments to the first defendant of the purchase price. On 22

December 1986, the second defendant certified in writing that the building had been completed to the stage of handing over of vacant possession and connection of water and electricity supply. By a letter dated 24 December 1986 the first defendant submitted to the second plaintiff the certificate of the second defendant notifying the second plaintiff that the sums of $69,000 and $23,00 had become due and payable by the first plaintiff to the first defendant and its solicitors accordingly. On 13 January 1987, in reliance thereof, the se cond plaintiff, on behalf of the first plaintiff, paid the said sums to the first defendant and its solicitors. It was asserted that in fact electricity supply was connected to the building thereby enabling the first defendant to deliver vacant possession of the building to the first plaintiff only 7 March 1990 and the certification of the second defendant and the notification of the first defendant was false and misleading.

Held, allowing the plaintiffs' appeal:

> There is no doubt at all that the second defendant is guilty of negligence and/or misrepresentation. First, there is no denial that the second defendant certified final payments of the two sums of $69,000 and $23,000 on 22 December 1986. Secondly, there is equally no denial that the second plaintiff, as financier of the first plaintiff relying on the certification of the second defendant, made payments of the two sums to the first defendant on 13 February 1987. Thirdly, it is again indisputable that the application for electricity supply would only be made to LLN when the first defendant sent the relevant forms to the first plaintiff on 16 November 1989 and it was only on 14 February 1990 that vacant possession was ready to be handed over by the first defendant with water and electricity supply. Thus, the electrical works were not completed or satisfactorily completed in 1986 when the second defendant issued its certificate on 22 December 1986.
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> It is clear that the second defendant whose duty was to issue a certificate of final payment when the vacant possession of the house was ready to be delivered complete with all electrical works to receive electricity supply from LLN must surely owe a duty ofcare to the plaintiffs when he knew or ought to have known that the plaintiffs would solely rely on its certification to make payments to the first defendant.

[Bahasa Malaysia summary

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Di dalam tindakan ini, plaintiff pertama telah membeli sebidang tanah daripada defendan pertama yang juga bersetuju membina sebuah bangunan di atas tanah itu untuk harga $460,000. Plaintiff pertama telah memasuki satu persetujuan pinjaman dengan plaintif kedua yang dikehendaki membuat

bayaran berperingkat harga pembelian itu. Setelah memfail writ dan penyata tuntutan mereka, plaintif telah memohon di bawah A 14 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk kebenaran memasukkan penghakiman interlokutori terhadap kedua-dua defendan pertama dan defendan kedua, yang merupakan arkitek defendan pertama, tentang pembinaan bangunan itu. Permohonan itu telah ditolak oleh penolong kanan pendaftar pada 30 Mac 1991. Plaintif telah merayu kepada Mahkamah Tinggi. Di pembicaraan rayuan itu pada 25 Julai 1991 plaintif telah menghujah mereka terhadap keputusan pendaftar tentang defendan kedua sahaja dan mengabaikan rayuan terhadap keputusan pendaftar tentang defendan pertama.

Melalui satu perjanjian jual-beli bertarikh 1 April 1985 yang dibuat antara defendan pertama dan plaintif pertamA('perjanjian itu'), defendan pertama bersetuju membeli sebidang tanah bersama sebuah bangunan yang akan dibina di atasnya oleh defendan pertama. Mengikut fasal 4(1) perjanjian itu, harga pembelian akan dibayar kepada defendan pertama secara ansuran mengikut peringkat penyempurnaan bangunan itu seperti yang dinyatakan di dalam Jadual Ketiga perjanjian itu. Mengikut butiran (3) Jadual Ketiga, satu bayaran ansuran sebanyak $69,000 harus dibayar kepada defendan pertama pada penyerahan pemilikan kosong tanah dan bangunan itu bersama sambungan bekalan air dan elektrik. Mengikut butiran (4) Jadual Ketiga, satu bayaran ansuran akhir sebanyak $23,000 harus dibayar kepada defendan pertama tetapi akan dipegang oleh 'stakeholder' defendan pertama dan bayaran akan dibuat dalam dua bayaran ansuran, iaitu $11,500 pada penghabisan enam bulan dan baki $11,500 pada penghabisan 12 bulan selepas penyerahan pemilikan kosong. Adalah menjadi tugas defendan kedua, sebagai arkitek, di bawah perjanjian itu untuk mengesahkan setiap peringkat penyempurnaan bangunan itu dan plaintif pertama dan/atau pembiayanya, plaintif kedua, akan bergantung kepada pengesahan itu bagi tujuan membuat bayaran ansuran kepada defendan pertama untuk harga pembelian. Pada 22 Disember 1986, defendan kedua mengesahkan secara bertulis bahawa bangunan itu telah disempurnakan ke peringkat penyerahan pemilikan kosong bersama sambungan bekalan air dan elektrik. Melalui sepucuk surat bertarikh 24 Disember 1986, defendan pertama mengemukakan pengesahan defendan kedua kepada plaintif kedua dan memberitahu plaintif kedua bahawa jumlah $69,000 dan $23,000 harus dibayaroleh plaintif pertama kepada defendan pertama dan peguamcaranya. Pada 13 Januari 1987, bergantung kepada pengesahan itu, plaintif kedua, bagi pihak plaintif pertama membayar jumlah tersebut kepada defendan pertama dan peguamcaranya. Telah didakwa bahawa sebena rnya bekalan elektrik telah disambung kepada bangunan itu, seterusnya membolehkan penyerahan pemilikan kosong oleh defendan pertama kepada plaintif pertama, cuma pada 7 Mac 1990. Jadi pengesahan defendan kedua itu dan pemberitahuan defendan pertama itu adalah palsu dan mengelirukan.

Diputuskan, membenarkan rayuan plaintif itu:

Tidak ada keraguan langsung bahawa defendan kedua telah bersalah kerana kecuaian dan/atau salah nyataan. Pertama, tidak dapat dinafikan bahawa defendan kedua telah mengesahkan bayaran akhir dua jumlah $69,000 dan $23,000 itu pada 22 Disember 1986. Kedua, juga tidak dapat dinafikan bahawa plaintif kedua, sebagai pembiaya plaintif kedua dengan bergantung kepada pengesahan defendan kedua itu, telah membayar kedua-dua jumlah itu kepada defendan pertama pada 13 Februari 1987. Ketiga, sekali lagi tidak dapat dipertikaikan bahawa permohonan untuk bekalan elektrik hanya akan dibuat kepada LLN apabila defendan pertama menghantar borang yang berkenaan kepada plaintif pertama pada 16 November 1989 dan cuma pada 14 Februari 1990 sahajalah pemilikan kosong sedia untuk diserahkan oleh defendan pertama bersama bekalan air dan elektrik. Lantaran itu, kerja-kerja elektrik belum dihabiskan atau dihabiskan dengan sempurna dalam 1986 apabila defendan kedua mengeluarkan pengesahannya pada 22 Disember 1986.

Adalah jelas bahawa defendan kedua yang mempunyai tugas untuk mengeluarkan sijil bayaran akhir apabila pemilikan kosong bangunan itu sedia untuk diserahkan lengkap dengan semua kerja-kerja elektrik untuk menerima bekalan elektrik daripada LLN tentulah mesti terhutang satu tugas bercermat kepada plaintif apabila beliau tahu atau patut tahu bahawa plaintif akan bergantung secara tunggal kepada pengesahannya untuk membuat bayaran kepada defendan pertama.]

[*Editorial Note*: The second defendant has appealed to the Supreme Court vide Civil Appeal No 03-107-1991.]

Cases referred to

Grant v Australian Knitting Mills Ltd [1936] AC 85 refd
Hedley Byrne & Co Ltd v Heller & Partners [1964] AC 465 folld
Dutton v Bognor Regis Urban District Council [1972] 1 QB 373 ; [1972] 1 All ER 462 folld

EH Lim (Mah-Kok & Din) for the plaintiffs.
Shafik Fauzan (Mun & Co) for the second defendant.

LIM BENG CHOON J In this action the first plaintiff purchased a piece of land from the first defendant who also agreed to construct a building thereon for the purchase price of $460,000. The first plaintiff entered into a loan agreement with the second plaintiff who was to make progress payments towards the purchase price. After filing their writ and statement of claim the plaintiffs applied under O 14 r 1 of the Rules of the High Court 1980 for leave to enter interlocutory judgment against both the first defendant and the second defendant who was the architect of the first defendant in respect of the construction of the building. The application for summary interlocutory

judgment of the plaintiff was dismissed by the senior assistant registrar ('SAR') on 30 March 1991. Being dissatisfied with the decision of the SAR the plaintiffs appealed to me on 1 April 1991. At the hearing before me on 25 July 1991 counsel for the plaintiffs confined his submission against the decision of the SAR in respect of the second defendant and abandoned the decision of the SAR against the first defendant. I allowed the appeal against the second defendant and directed that damages against the second defendant would be assessed by the court. The second defendant now appeals against my decision to the Supreme Court and I hereby give my grounds of judgment. It is necessary at the outset to give a brief summary of the averments of the plaintiffs as appeared in their statement of claim. By a written sale and purchase agreement dated 1 April 1985 made between the first plaintiff and the first defendant ('the sale and purchase agreement'), the first defendant agreed to sell and the first plaintiff agreed to purchase a piece of land with a building to be erected thereon by the first defendant. By cl 4(1) of the said agreement the purchase price was to be paid to the first defendant by instalments progressively according to the stages of completion of the building set out in the Third Schedule of the said agreement. By item (3) of the Third Schedule, an instalment in the sum of $69,000 would become due and payable to the first defendant on the handing over of vacant possession of the land and building with connection of water and electricity supply to the said building. By item (4) of the Third Schedule a final instalment of $23,000 would be due and payable to the first defendant but which was to be held by the first defendant's solicitors as stakeholders and payments thereof to be made in two instalments, that is to say a sum of $11,500 upon the expiry of six months and the balance of $11,500 at the expiry of 12 months after the handing over of vacant possession. At all material times the second defendant was the architect for the first defendant and as such it was the second defendant's duty under the sale and purchase agreement to certify each stage of completion of the building for which certification would be relied upon by the first plaintiff and/or its financier, the second plaintiff, for the purposes of making instalment payments to the first defendant of the purchase price. The second defendant therefore owed a duty to the first plaintiff to ensure that its certification of each stage of completion of the building would be true and accurate. On 22 December 1986, the second defendant certified in writing that the building had been com pleted to the stage of handing over of vacant possession and connection of water and electricity supply to the building. By a letter dated 24 December 1986, the first defendant submitted to the second plaintiff thecertificate of the second defendant notifying the second plaintiff that the sums of $69,000 and $23,000 had become due and payable by the first plaintiff to the first defendant and its solicitors respectively. On 13 January 1987 in reliance of the first defendant's letter and the second defendant's certificate, the second plaintiff, on behalf of the first plaintiff, paid to the first defendant and its solicitors the said sums of $69,000 and $23,000 respectively. It was asserted that in fact electricity supply was connected to the building, thereby enabling the first defendant to deliver vacant possession of the building to the first plaintiff, only on 7 March 1990 and the certification of the second defendant and the notification of the first defendant were false and misleading. The first defendant had therefore received the said sums of $69,000 and $23,000 to the use of the first plaintiff over the period of 13 January 1987 to 7 March 1990. The second defendant was negligent in the certification and the plaintiffs gave particulars of the second defendant's negligence which were:

(1) certifying that the above-mentioned stage of completion had been reached when it was not true;

(2) failure to ascertain the actual stage of completion; and

(3) knew or ought to have known that the first plaintiff and/or its financiers would rely upon the certification to make instalment payments to the first defendant when it was not due and payable.

By reason of the matters aforesaid, the first plaintiff had sustained loss and damage. The first plaintiff therefore claimed against both the first and second defendants – (a) damages referred to in para 15 of the statement of claim; (b) interest thereon at such rate and period as the court deemed fit; and (c) costs. It is to be noted that I only summarized the averments of the plaintiffs' statement of claim insofar as they are related to the claim of the plaintiffs against the second defendant. I have omitted most of the averments of the plaintiffs relating to their claim against the first defendant since at the hearing of the plaintiffs' appeal counsel for the plaintiff had, as stated earlier, confined himself in attacking the decision of the SAR insofar as it concerned the second defendant. In its defence, the second defendant denied all the charges of negligence made against it and particularly averred that firstly the second defendant did not owe a duty of care to the plaintiffs. Secondly in any event at the time of issuing of its certificate of payment all the connections for the supply of electricity and water were completed. It was through the first plaintiff's unwillingness and/or negligence in failing to pay the necessary deposits to the authorities concerned that they would not supply electricity and water to the building. The second defendant also denied that the first plaintiff suffered any losses or damages and put the first plaintiff to strict proof of the same. In its affidavit in support of its application for summary interlocutory judgment the director of the first plaintiff, Low Hup Seng, affirmed the said affidavit on 4 October 1990 in which the following relevant documents were annexed thereto as:Exh 'LHS1': the sale and purchase agreement executed between the first defendant and the first plaintiff on 15 April 1985. Exh 'LHS2': the certification of the second defendant dated 22 December 1986 in which it was stated:

This is to certify that the 31/2 storey shophouse on Lots SH-1 to SH-24 Taman Putra Sulaiman – 1B have been completed up to the stage of:

Handing over of vacant possession and connection of water and electricity supply to the building ... 15%. To be held by vendor's solicitors as stakeholders ... 5%.

Signed

Wong Kin Men Associates,

Chartered Architects

Room 4.107-4.109

4th Floor Wisma Central

Jalan Ampang

50450 Kuala Lumpur

Exh 'LHS3': the first defendant's notice to the second plaintiff dated 24 December

1986 forwarding the second defendant's certificate of payment of –

(i) Handing over of vacant possession & connection of water & electricity supply to the building 15% $69,000

(ii) To stakeholders:

M/s Syed Alwi, Ng & Teoh 5% $23,000 $92,000 Exh 'LHS6': letter from the first plaintiff's solicitors to the second defendant dated 26 May 1990 which contained the following pertinent passages:

(3) We are instructed that the said certification was a misrepresentation and erroneous as the electricity supply was connected to our client's property which is Lot SH-19 only 7 March 1990.

(4) By reason of the above our client has been caused to pay unnecessary interest amounting to $30,901.28 for the loan of the abovesaid sums of $69,000 and $23,000 over the period of 13 January 1990 1987 [sic] to 7 March 1990.

(5) Our further instructions are to demand from you which we hereby do that you compensate our client for the incurrence of the interest aforesaid. Take notice that unless the said sum of $30,901.28 and a further sum of $150 being our solicitors cost for this letter is paid to us as solicitors within seven days from the date hereof our instructions are to commence legal proceedings against you for the recovery thereof and further interest and costs.

In the affidavit, it was stated that:

the defendants are and were justly and truly liable to the first plaintiff for damages together thereon. As a result of certain payments made to the first defendant pursuant to a certificate issued by the second defendantand

... there is no defence to this action except for the amount of damages as regards the first plaintiff's claim for damages against both defendants.

Another affidavit was affirmed by Low Hup Seng on behalf of the first plaintiff on 8 November 1990(encl 9) in which it was stated:

(3) As further evidence that electricity supply was not connected right up to at least 16 December 1989(if not later) now produced and shown to me marked accordingly are copies of the following documents:

(3).1 'LHS-7': letter dated 18 October from Biro Pengaduan Awam, Jabatan Perdana Menteri;

(3).2 'LHS-8': letter dated 15 November 1989 from the first defendant enclosing LLN forms for completion before electricity supply would be connected;

(3).3 'LHS-9': letter dated 16 November 1989 from the first plaintiff to the first defendant (returning the LLN forms duly signed and chopped with a reminder that electricity deposit of $1,180 had been posted to the first defendant on 14 November 1989).

(4) As pleaded in para 12 of the statement of claim, vacant possession was delivered by the first defendant to me on 7 March 1990. Now produced and

shown to me marked 'LHS-10' is a true copy of a letter dated 14 February 1990 from the first defendant to the first plaintiff requesting the first plaintiff to take delivery of vacant possession. Now produced and shown to me marked 'LHS-11' is a true copy of the document dated 7 March 1990. I signed acknowledging receipt of the keys to the house and of taking possession (words in parenthesis supplied).

The first defendant through its chairman Lin Kim Hock affirmed an affidavit-in-reply dated 13 December 1990 in which it was stated, inter alia, that as the first defendant had obtained an order in Civil Suit D1-24-281-84 approving a composite scheme of arrangement proposed to be made between 'the applicants (which included the first defendant), their creditors and the holders of the scheme shares', the plaintiffs could not now proceed with their action against the first defendant. The second defendant through its chairman, Wong Kin Men, affirmed an affidavit dated 19 December 1990(encl 12) in which it was stated firstly that pursuant to cl 15(1) and (2) of the sale and purchase agreement it was the responsibility of the first defendant as vendor to cause to be laid all necessary water, electricity and sewerage mains to the building at its own costs, and the first plaintiff as purchaser was liable to pay for the deposits of installation of water and electricity meters. The delay in handing over vacant possession of the land and building was not due to the negligence of the second defendant as it had duly checked and was satisfied that the project was completed when it issued the certification on 18 December 1986. The second defendant could not be asked to bear the burden of ensuring that the first defendant's responsibility of applying to the appropriate authority for the electricity supply was discharged. From the documents produced by the first plaintiff annexed to the affidavits of Low Hup Seng it clearly showed that it was due to the failure on the part of the first defendant to deliver vacant possession on time and not in any way due to the fault of the second defendant.In his submission, counsel for the second defendant submitted that the pleadings of the plaintiffs created some confusion, in particular para 15 of the statement of claim in which the plaintiffs averred that the first plaintiff had suffered loss and damage and gave particulars of the said loss and damage. According to counsel, the pleading in the said para 15 was bad pleading because the second defendant could not be expected to know the claim against him and this would prejudice the second defendant. It is to be noted that counsel had not said a single word regarding the question of liability on the part of the second defendant. From the pleadings of the respective parties and the affidavit evidence adduced, I have no doubt at all that the second defendant is guilty of negligence and/or misrepresentation and I say so for these reasons. There is firstly no denial that the second defendant certified final payments of the two sums of $69,000 and $23,000 on 22 December 1986. Under the Third Schedule of the sale and purchase agreement items 3 and 4, payments for the two sums were due only 'on handing over of vacant possession and *connection of water and electricity*'. Pursuant to cl 4(11) of the sale and purchase agreement the balance of the purchase price would have to be paid 'by instalments and at the time and in the manner as prescribed in the Third Schedule thereto' and under sub-cl (2) of that clause it was stated:

Every notice referred to in the Third Schedule requesting for payment shall be

supported by a certificate under *the hand of the vendor's architect* and every such certificate so signed *shall be proof of the fact that the works therein referred to have been completed*. (Emphasis supplied.)

Secondly there is equally no denial that the second plaintiff, as financier of the first plaintiff relying on the certification of the second defendant, made payments of the said two sums to the first defendant on 13 February 1987. Thirdly it is again indisputable that application for electricity supply could only be made to LLN when the first defendant sent the relevant forms to the first plaintiff on 16 November 1989 and it was only on 14 February 1990 that the first defendant was ready to hand over vacant possession of the building with water and electricity supply. Bearing in mind that had all the electrical works been ready to receive electricity from the main supply of LLN it would be a simple matter of filling some forms and payment of a deposit whereupon LLN would take the necessary steps to supply electricity to the building. The fact that an application for electricity could only be made to LLN on or about 16 November 1989 must, on the balance of probabilities, show that the electrical works had not been completed or satisfactorily completed when the second defendant issued its certificate on 22 December 1986. Had the electrical works been completed or satisfactorily completed on the date of the second defendant's certification, it is highly incredible that the first defendant would have waited for nearly three years before requesting the first plaintiff to apply to LLN for electricity supply. There is no earthly reason for such a long delay had the electrical works been completed or satisfactorily completed in 1986. The one and only conclusion that I can arrive at is that the electrical works were not completed or satisfactorily completed in 1986 when the second defendant issued its certification on 22 December 1986. I reiterate that the second defendant is guilty of negligence and/or misrepresentation which caused thefirst plaintiff to suffer loss or damage in that it had to pay interests to the second plaintiff for the premature release of the said two sums of money. Notwithstanding the above finding, it is still necessary to consider whether the second defendant owed the plaintiffs a duty of care for 'no case of actionable negligence will arise unless the duty to be careful exists' (per Lord Wright in *Grant v Australian Knitting Mills Ltd* 1 at p 103). The recognition of liability for careless misstatements is settled by the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners* 2. The principle is that there is a duty situation whenever 'the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him'. This principle is advanced further in *Dutton v Bognor Regis Urban District Council* 3. There a builder, X, had started to build a house on land belonging to him and on the site of an old rubbish tip, which had been filled in. The foundations were not strong enough to support the kind of house that was being built on such insecure soil. An inspector of the defendant council negligently failed to discover that the foundations were inadequate and in consequence approval was given to X to proceed with the house. X did so and eventually sold the house to a purchaser, who later sold it to the plaintiff. Serious structural defects soon began to appear as the house subsided. The plaintiff sued the defendants who were held liable. A point that emerges from this case is that it is not even essential to show that the plaintiff relied on the defendant's statement in buying the house. The liability of the defendant is established once it is found that they owe a duty of care in giving the approval to

proceed with the building to the purchaser of the house. Applying the principles laid down in the aforecited cases to the present case, it is clear that the second defendant whose duty was to issue a certificate of final payments when the vacant possession of the house was ready to be delivered complete with all electrical works to receive electricity supply from LLN must surely owe a duty of care to the plaintiffs when he knew or ought to have known that the plaintiffs would solely rely on its certification to make payments to the first defendant. Finally as regards the pleadings in the statement of claim there is no doubt that the plaintiffs were claiming against both the defendants for loss or damage suffered by the first plaintiff due to the premature payments which caused them to have to pay extra interests to their financier, the second plaintiff, in the sum of $30,901.28 for the period from 13 January 1987 to 7 March 1990. This claim was clearly pleaded in paras 14 and 15 of the statement of claim. On the grounds as stated above, I therefore allowed the appeal of the first plaintiff against the second defendant and directed that damages be assessed by the court.

Appeal allowed

Reported by Kevin Mathews